

A "qualified sale" is a sale of building materials that will be incorporated into real estate as part of a project for which a Certificate of Eligibility for Sales Tax Exemption has been issued. 35 ILCS 120/5k. (This is a PLR).

January 17, 2003

Dear Xxxxx:

This Private Letter Ruling, issued pursuant to 2 Ill. Adm. Code 1200 (see <http://www.revenue.state.il.us/legalinformation/regs/part1200>), is in response to your letter of September 20, 2002. Review of your request for a Private Letter Ruling disclosed that all information described in paragraphs 1 through 8 of subsection (b) of Section 1200.110 appears to be contained in your request. This Private Letter Ruling will bind the Department only with respect to COMPANY for the issue or issues presented in this ruling. Issuance of this ruling is conditioned upon the understanding that neither COMPANY nor a related taxpayer is currently under audit or involved in litigation concerning the issues that are the subject of this ruling request.

In your letter, you have stated and made inquiry as follows:

On behalf of our client, COMPANY, we respectfully request the Illinois Department of Revenue issue a Private Letter Ruling pursuant to 2 Ill. Adm. Code Sec. 1200.110 with respect to the following factual situation.

General Information

1. Enclosed please find an original Form IL-2848 Power of Attorney, authorizing FIRM to represent COMPANY before the Illinois Department of Revenue (the 'Department').
2. This Private Letter Ruling ('PLR') is not requested with regard to hypothetical or alternative proposed transactions. The PLR is requested to determine the state and local Retailer's Occupation Tax and Use Tax consequences of the actual business practices of the Company.
3. The Company is not currently engaged in litigation with the Department in regard to this or any other tax matter.
4. The Company is not currently under audit by the Department in regard to any tax matter. However, the Company has been contacted by Department Auditor who has scheduled an audit of the Company for November 13, 2002, through November 15, 2002.

5. The Company has not previously requested the Department to rule on this matter. However, the Department did issue private letter ruling dated September 24, 2001, to the Company regarding a related matter.
6. The Company requests that certain information be deleted from the PLR prior to dissemination to others. The Company requests that its name, address, location of its plant and the name of its representative be deleted.
7. The Company knows of no authority contrary to the authorities referred to and cited below.

Statement of Material Fact

1. The Company is engaged in the operation of a 537 megawatt natural gas fired combined-cycle electricity generating facility ('power plant') it constructed in unincorporated County, Illinois.
2. The power plant is located in the NAME enterprise zone.
3. In the private letter ruling issued to Company on September 24, 2001, the Department ruled that the materials described in Attachment B of the request for private letter ruling dated February 26, 2001, were qualified building materials. Attachment B (copy enclosed) provided a detailed description of the following items along with the manner of affixation to the realty:

Concrete foundations for building and equipment support;
Two (2) utility grade combustion turbine generators;
Two (2) heat recovery steam generators;
One (1) single automatic extraction condensing steam turbine generator;
Eight (8) main transformers and eight (8) electrical switches;
Electrical equipment including above-ground and below-ground conduit and cabling; and
Piping for water supply and natural gas supply.

4. The following is a list of significant systems that are affixed to and incorporated into the power plant building structures:

Ammonia storage system
Continuous emissions monitoring system
Combustion turbine excitation system
Combustion turbine starting system
Combustion turbine fire protection system
Combustion turbine electrical systems
Combustion turbine low voltage system
Combustion turbine protective relaying system
Combustion turbine supervisory system
Steam turbine excitation system
Steam turbine lube oil system
Steam turbine fluid system
Steam turbine control oil system
Steam turbine generator/exciter cooling system

Steam turbine generator seal oil system
Steam systems
Steam turbine condenser
Circulating water system
Cooling tower chemical feed
Cooling water system
Cooling tower
Condensate system
Condensate pumps
Feedwater system
Boiler feedwater pumps
Raw water treatment system
Cycle chemical feed
Sampling system
Wastewater collection and treatment system
Air compressor system
Compressed gas system
Fuel gas system
Fire protection system
Generator terminal system
Other power/systems

5. Prior to the construction of the power plant, AAA, an affiliate of the Company, established a physical location within the geographic boundaries of the enterprise zone in unincorporated County, Illinois.
6. AAA is registered with the Department as a retailer at its location within unincorporated County, Illinois and purchases repair and replacement parts tax-free for resale to Company.
7. AAA maintains a physical inventory of repair and replacement parts and receives, accepts, and approves Company's purchase orders at its location within unincorporated County, Illinois.
8. AAA sells repair and replacement parts for the materials deemed to be qualified building materials by the Department in private letter ruling issued to Company on September 24, 2001.
9. AAA has established procedures in order to satisfy the requirements as provided in 86 Illinois Adm. Code Sec. 130.1951 and 35 ILCS 120/5k as amended August 6, 2002, to qualify for the 'enterprise zone building materials exemption.' Please refer to Attachment A-1 for the specific procedures that AAA has implemented to procure the repair and replacement parts.
10. Attachment B describes the materials deemed to be qualified building materials by the Department in private letter ruling issued to Company on September 24, 2001.

Ruling Requested

1. The procedures established by AAA as identified in Attachment A-1 meet the Department's requirements as provided in 86 Ill. Adm. Code 130.1951 and 35 ILCS 120/5k in order to qualify for the state and local sales tax exemption for the sale of building materials to be incorporated into realty within an enterprise zone.
2. The systems, components, and repair and replacement parts either affixed to the materials identified and described in Attachment B or affixed to other dedicated power plant building structures qualify as 'building materials' for the purpose of the Retailer's Occupation Tax deduction provided in 35 ILCS 120/5k and 86 Ill. Adm. Code Sec. 130.1951.

Relevant Authorities

The Illinois Retailers' Occupation Tax Act [35 ILCS 120/2] imposes a tax on persons engaged in the business of making retail sales of tangible personal property. In accordance with Sec. 2-10 of the Act, this tax is measured by a seller's gross receipts [35 ILCS 120/2-10]. Pursuant to Sec. 5k of the Act [35 ILCS 120/5k], each retailer who makes a qualified sale of building materials to be incorporated into real estate in an enterprise zone established by a county or municipality under the Illinois Enterprise Zone Act by remodeling, rehabilitation or new construction, may deduct receipts from such sales when calculating the tax imposed by this Act.

Materials Sold between September 1, 1985 and December 31, 2001

Under 86 Ill. Adm. Code Sec. 130.1951(b)(1), the retailer of the qualifying building materials must be located in the municipality or unincorporated area of the county which has established the enterprise zone into which the building materials will be incorporated for purchases made between September 1, 1985 and December 31, 2001. In order to establish that the retailer is located in the municipality or unincorporated area of the county which has established the enterprise zone, the retailer must at the time of sale:

- 1) have an identifiable physical presence in the municipality or unincorporated area of the county that has established the enterprise zone;
- 2) be registered with the Department as a retailer at a location in the municipality or unincorporated area of the county that has established the enterprise zone; and
- 3) be able to document the acceptance of purchase orders at a location in the municipality or the unincorporated area of the county that established the enterprise zone.

86 Ill. Adm. Code Sec. 130.1951(b)(2) further provides that two separate transactions must exist independent of each other and must be properly documented. The transactions are:

- 1) a sale from the supplier to the retailer who is located in the jurisdiction that created the enterprise zone (exempt as a sale for resale); and
- 2) a sale from the retailer who is located in the jurisdiction that created the enterprise zone to a purchaser who will incorporate those materials into real estate located in the enterprise zone (exempt by reason of the enterprise zone building materials exemption).

The following documentation establishes a sale from a supplier to a retailer who is located in the jurisdiction that created the enterprise zone:

- 1) a purchase order issued by the retailer to the supplier;
- 2) a Certificate of Resale issued by the retailer to the supplier;
- 3) an invoice from the supplier to the retailer; and
- 4) evidence of payment to the supplier from the retailer.

The following documentation establishes a sale from the retailer who is located in the jurisdiction that created the enterprise zone to the purchaser:

- 1) a purchase order issued by the purchaser to the retailer;
- 2) an exemption certificate issued by the purchaser to the retailer certifying that the materials will be incorporated into realty within the enterprise zone;
- 3) an invoice from the retailer to the purchaser; and
- 4) evidence of payment to the retailer from the purchaser.

Materials Sold on or After January 1, 2002, and on or Before August 5, 2002

Under 86 Ill. Ill. Adm. Code Sec. 130.1951(c)(1), on and after January 1, 2002, there is no requirement that the retailer from whom the materials are purchased be located in a jurisdiction that created the enterprise zone into which the materials will be incorporated. However, if the retailer is located in a jurisdiction that has an enterprise zone ordinance that places restrictions on sales of building materials being purchased for incorporation into its enterprise zone, then those restrictions are applicable to all sales of building materials being purchased for incorporation into any Illinois enterprise zone.

In accordance with 86 Ill. Adm. Code Sec. 130.1951(c)(2), AAA has looked to the enterprise ordinance in effect in the jurisdiction where it is located to determine if there are any restrictions on its sales of tax exempt building materials. Because Company's power plant is an industrial facility located within the enterprise zone and AAA is located within the unincorporated area of County, the sales of the building materials can be made tax-free under the enterprise zone ordinance.

To meet the above requirements, as indicated in Attachment A-I, AAA has established a physical presence within the unincorporated area of County, Illinois and will receive, accept and approve purchase orders at that location. AAA will purchase the repair and replacement parts that will be incorporated into the component parts of the building materials that are permanently affixed to the realty within the enterprise zone. AAA will resell the building materials to the Company who will provide or contract for the installation and erection of the repair and replacement parts into the realty.

The facts indicate that the procedures implemented to procure the building materials, as provided in Attachment A-1, satisfy the requirements set forth in 86 Ill. Adm. Code Sec. 130.1951. Therefore, AAA may make tax-free sales of qualifying building materials that will be incorporated into realty within the enterprise zone.

Materials Sold on or After August 6, 2002

Under Public Act 92-0779, the Retailers' Occupation Tax Act is amended August 6, 2002. 35 ILCS 120/5k (as amended August 6, 2002) provides in pertinent part,

'To document the exemption allowed under this Section, the retailer must obtain from the purchaser a copy of the Certificate of Eligibility for Sales Tax Exemption issued by the administrator of the enterprise zone into which the building materials will be incorporated. The Certificate of Eligibility for Sales Tax Exemption must contain:

1. a statement that the building project identified in the Certificate meets all the requirements for the building material exemption contained in the enterprise zone ordinance of the jurisdiction in which the building project is located;
2. the location or address of the building project; and
3. the signature of the administrator of the enterprise zone in which the building project is located.

In addition, the retailer must obtain certification from the purchaser that contains:

1. a statement that the building materials are being purchased for incorporation into real estate located in an Illinois enterprise zone;
2. the location or address of the real estate into which the building materials will be incorporated;
3. the name of the enterprise zone in which that real estate is located;
4. a description of the building materials being purchased; and
5. the purchaser's signature and date of purchase.'

The facts indicate that the procedures implemented to procure the building materials, as provided in Attachment A-1, satisfy the requirements set forth under 35 ILCS 120/5k as amended August 6, 2002. Therefore, AAA may make tax-free sales of qualifying building materials that will be incorporated into realty within the AAA enterprise zone.

Building Materials

In order to qualify for the deduction as provided in 35 ILCS 120/5k, the repair and replacement parts must constitute 'building materials' as provided in 86 Ill. Adm. Code Sec. 130.1951.

86 Ill. Adm. Code Sec. 130.1951(d) provides:

In order to qualify for the deduction, the materials being purchased must be building materials. That is, they must be purchased for *physical incorporation* into real estate. (Emphasis added)

The regulation also provides examples of qualifying building materials:

Common building materials such as lumber, bricks, cement, windows, doors, insulation, roofing materials and sheet metal can qualify for the deduction (86 Ill. Adm. Code Sec. 130.1951(d)(1)).

Plumbing systems and components thereof such as bathtubs, lavatories, sinks, faucets, garbage disposals, water pumps, water heaters, water softeners and water pipes can qualify for the deduction (86 Ill. Adm. Code Sec. 130.1951(d)(2)). Heating systems and components thereof such as furnaces, ductwork, vents, stokers, boilers, heating pipes and radiators can qualify for the deduction (86 Ill. Adm. Code Sec. 130.1951(d)(3)).

Electrical systems and components thereof such as wiring, outlets and light fixtures which are physically incorporated into the real estate can qualify for the deduction (86 Ill. Adm. Code 130.1951(d)(4)).

Built-in appliances such as refrigerators, stoves, ovens and trash compactors which are physically incorporated into the real estate can qualify for the deduction (86 Ill. Adm. Code 130.1951(d)(7)).

Under the private letter ruling issued to Company on September 24, 2001, the Department ruled that the following items were qualified building materials:

- Concrete foundations for building and equipment support;
- Two (2) utility grade combustion turbine generators;
- Two (2) heat recovery steam generators;
- One (1) single automatic extraction condensing steam turbine generator;
- Eight (8) main transformers and eight (8) electrical switches;
- Electrical equipment including above-ground and below-ground conduit and cabling; and
- Piping for water supply and natural gas supply.

Therefore, the question is whether the systems, components, and repair and replacement parts that are either affixed to the materials identified and described in Attachment B or affixed to other dedicated power plant building structures qualify as 'building materials' for the purpose of the Retailer's Occupation Tax deduction provided in 35 ILCS 120/5k and 86 Ill. Adm. Code Sec. 130.1951.

On April 5, 2001, the Department issued PLR number ST-01-0012-PLR to a company that owns an electric power plant located within an Illinois enterprise zone. In this PLR the Department ruled that the enterprise zone exemption includes component parts of the building materials that are permanently affixed to realty and that if the building materials or their component parts need to be repaired or replaced, those repair and replacement parts that are permanently affixed to real estate qualify for the exemption.

Conclusions

35 ILCS 120/5k provides that each retailer who makes a qualified sale of building materials to be incorporated into real estate in an enterprise zone established by a county or municipality under the Illinois Enterprise Zone Act by remodeling, rehabilitation or new construction, may deduct such receipts from such sales when calculating the tax imposed by this Act.

The deduction provided in 35 ILCS 120/5k is applicable to receipts from the sales of 'building materials.' In order to qualify as 'building materials,' the items must be physically incorporated into real estate.

The systems, components, and repair and replacement parts in question qualify as 'building materials' for purposes of the deduction provided in 35 ILCS 120/5k. The systems, components, and repair and replacement parts are either affixed to the materials deemed to be qualified building materials under the PLR issued to Company or are affixed to other dedicated power plant building structures. Since the systems, components, and repair and replacement parts qualify as building materials, the Company may purchase the systems, components, and repair and replacement parts from AAA exempt from state and local Retailer's Occupation Tax and Use Tax.

We respectfully request that the Department issue a ruling stating that the procedures outlined in Attachment A-1 satisfy the Department's regulations found at 86 Ill. Adm. Code 130.1951 and that the systems, components, and repair and replacement parts either affixed to materials described in Attachment B or affixed to other dedicated power plant building structures qualify as 'building materials' for the purposes of the deduction provided in 35 ILCS 120/5k.

If the Department can not conclude that the procedures outlined above conform to the Department's regulations or that the systems, components and repair and replacement parts qualify as 'building materials,' I request the Department contact me to determine what additional information is required or allow the taxpayer to rescind this ruling request.

Since the issuance of your original Private Letter Ruling, the law governing the enterprise zone building materials exemption from sales tax has undergone changes. Effective August 6, 2002, P. A. 92-0779 made some changes to 35 ILCS 120/5k that sets forth the exemption.

Beginning August 6, 2002, under the new legislation the exemption now applies to "qualified sales" of building materials. A "qualified sale" is a sale of building materials that will be incorporated into real estate as part of a project for which a Certificate of Eligibility for Sales Tax Exemption has been issued. As long as the following documentation is provided, purchases can be made tax-free at any location. The administrator of the enterprise zone in which the building project is located must issue the Certificate of Eligibility for Sales Tax Exemption.

To document the exemption, the purchaser must provide the retailer with a Certificate of Eligibility for Sales Tax Exemption that contains:

- 1) a statement that the building project identified in the Certificate meets all the requirements for the enterprise zone ordinance of the jurisdiction in which the building project is located,
- 2) the location or address of the building project, and
- 3) the signature of the administrator of the enterprise zone in which the building project is located.

The purchaser must also provide the retailer with a certification that contains:

- 1) a statement that the building materials are being purchased for incorporation into real estate located in an Illinois enterprise zone,
- 2) the location or address of the real estate into which the building materials will be incorporated,
- 3) the name of the enterprise zone in which that real estate is located,

- 4) a description of the building materials being purchased, and
- 5) the purchaser's signature and date of purchase.

The new law also provides that the municipalities or counties that created the enterprise zone into which the building materials will be incorporated may neither require nor prohibit the purchase of building materials from any retailer or class of retailers in order to qualify for the exemption.

The procedures set forth in Attachment A-1 of your letter meet the requirements of the current statutory provisions. The status of the building materials listed in Attachment B of your letter has not changed since the issuance of the January 9, 2001 Private Letter Ruling. This ruling only applies to the building materials listed in Attachment B. The ruling does not apply to the list of items in the body of your letter under Material Facts #4. Not enough information was supplied regarding these items for a ruling to be made.

The facts upon which this ruling are based are subject to review by the Department during the course of any audit, investigation, or hearing and this ruling shall bind the Department only if the material facts as recited in this ruling are correct and complete. This ruling will cease to bind the Department if there is a pertinent change in statutory law, case law, rules or in the material facts recited in this ruling.

I hope this information is helpful. If you have further questions concerning this Private Letter Ruling, you may contact me at (217) 782-2844. If you have further questions related to the Illinois sales tax laws, please visit our website at www.revenue.state.il.us or contact the Department's Taxpayer Information Division at (217) 782-3336.

Very truly yours,

Melanie A. Jarvis
Associate Counsel

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